No. 10049.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

BERLIN AND RUSSELL AIRCRAFT MACHINE AND MANUFACTURING COMPANY, a co-partnership, CHARLES T. RUSSELL and INTERCONTINENT AIRCRAFT CORPORATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

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TABLE OF AUTHORITIES CITED.

Cases.

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Opinion Below.

The only previous opinion in this case is the memorandum of conclusions of the District Court [R. 22-25], which is not reported.

Jurisdiction.

This appeal involves federal unemployment taxes for the year 1941 in the amount of $1,986.88. [R. 19-21.] The taxpayer filed in the District Court a petition dated April 3, 1941, asking that proceedings might be had in accordance with the provisions of Chapter XI of the Bankrutcy Act of 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840. [R. 2-10.] The District Court granted this petition by order filed April 4, 1941. [R. 15.] On August 21, 1941, the United States filed an amended claim against the debtor in the District Court for the taxes involved herein. [R. 17-18.] The jurisdiction of the District Court to pass on such claim is found in Sections 2a(2) and 351 of the Bankruptcy Act of 1898, as amended by the Act of June 22, 1938. The decision of the District Court was filed November 3, 1941. [R. 29.] The notice of appeal was filed November 21, 1941 [R. 30], and the case comes to this Court pursuant to the provisions of Section 128 (c) of Judicial Code and Section 24 of the Bankruptcy Act of 1898, as amended by the Act of June 22, 1938.

Question Presented.

In 1941 the taxpayer employed eight or more persons from January 1 to May 16, inclusive. Did the taxpayer thereby become an "employer", as that term is defined in Section 1607 (a) of the Internal Revenue Code, by virtue of the employment of eight or more persons on each of some 20 days during the year, each day being in a different calendar week?

Statute and Regulations Involved.

Internal Revenue Code:

SEC. 1600.[1] RATE OF TAX.

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938. (U.S.C., 1940 ed., Title 26, Sec. 1600.)

SEC. 1607.[2] DEFINITIONS.

When used in this subchapter—

(a) *Employer.*—The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more. * * * (U.S.C., 1940 ed., Title 26, Sec. 1607.)

SEC. 1609. RULES AND REGULATIONS.

The Secretary and the Social Security Board, respectively, shall make and publish such rules and regulations, not inconsistent with this subchapter, as may be necessary to the efficient administration of the

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[1]As amended by the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360, Sec. 608.

[2]As amended by the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360, Sec. 614.

functions with which each is charged under this subchapter. The Commissioner, with the approval of the Secretary, shall make and publish rules and regulations for the enforcement of this subchapter, except sections 1602 and 1603. (U.S.C., 1940 ed., Title 26, Sec. 1609.)

Treasury Regulations 107, relating to the excise tax on employers under the Federal Unemployment Tax Act:

SEC. 403.205. *Who are employers.*—Every person who employs eight or more employees in employment within the meaning of section 1607 (c) and (d) of the Act on a total of 20 or more calendar days during a calendar year, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

The several weeks in each of which occurs a day on which eight or more employees are employed need not be consecutive weeks. It is not necessary that the employees so employed be the same individuals; they may be different individuals on each day. Neither is it necessary that the eight or more employees be employed at the same moment of time or for any particular length of time or on any particular basis of compensation. It is sufficient if the total number of employees employed during the 24 hours of a calendar day is eight or more.

Statement.

The facts are stated in a stipulation of facts. [R. 20-22.]

The taxpayer is a co-partnership which was organized on November 7, 1940. During the period from January 1, 1941, to May 16, 1941, inclusive, the taxpayer employed eight or more persons on each weekday, with the exception of holidays and some Saturdays. It was stipulated that the taxpayer had no employees after May 16, 1941, when it ceased to do business. [R. 21-22.] It did not file any returns under the Federal Unemployment Tax Act. Its payroll from January 1 through May 16 amounted to $66,229.05, and it was stipulated that, if any federal unemployment tax was due, the amount of the tax (based on three percent of the payroll) was $1,986.88. [R. 21.]

In April, 1941, the taxpayer petitioned for an arrangement under Chapter XI of the Bankruptcy Act, and the petition was granted by order of the United States District Court dated April 4, 1941. [R. 13-15.] The United States filed a claim for unemployment taxes for the period from January 1, 1941, to May 16, 1941 [R. 17-18], and the taxpayer opposed their payment on the ground that no taxes were owed. [R. 19.] After a hearing before the District Court, an order was entered holding that the taxpayer had not employed eight or more persons during 20 days of the year, each in a different calendar week. [R. 28-29.] The United States has appealed from this decision. [R. 30.]

Statement of Points to Be Urged.

1. The District Court erred in refusing to hold that the taxpayer was an "employer" during the taxable year 1941, within the meaning of Section 1607 (a) of the Internal Revenue Code.

2. The District Court erred in disallowing the claim filed on behalf of the United States for federal unemployment taxes.

Summary of Argument.

The taxpayer employed eight or more persons on at least one day in each week during a period of 18 full calendar weeks of the year and on at least one day during the calendar week preceding this period and one day during the week succeeding such period. Therefore, the taxpayer employed eight or more persons on each of some 20 days during the taxable year, each day being in a different calendar week. This made the taxpayer an employer under the Federal Unemployment Tax Act, and it owed the taxes claimed herein.

ARGUMENT.

The Taxpayer Employed Eight or More Persons on Some 20 Days, Each in a Different Week, Within the Taxable Year, and Was an "Employer" Under the Act.

The only question in this case is whether the partnership, hereinafter referred to as "the taxpayer," is an "employer" as that word is defined in Section 1607 (a) of the Internal Revenue Code, as amended. If so, it was required by Section 1600 of the amended Code to pay three percent of its payroll as an unemployment tax. The taxpayer was an "employer" if, during the calendar year 1941, which corresponds to the taxable year, it employed eight or more persons on each of some 20 days, each day being in a different calendar week. It has been stipulated that eight or more persons were employed by the taxpayer during the entire period from January 1, 1941, to May 16, 1941, inclusive. The taxpayer claims, and the court below agreed, that during this period there were not 20 such days within the taxable year, "each day being in a different calendar week." This position is based on the theory that all seven days of the different calendar weeks must be within the taxable year in order to be a "different calendar week" under the Act.

The period of employment began on Wednesday, January 1, 1941.[3] Since the four days from Wednesday, January 1, to Saturday, January 4, do not constitute an

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[3]For the convenience of the Court, a calendar containing the first five months of 1941 is reproduced in the Appendix, *infra*, p. 13.

entire calendar week, it is contended that no day of that week may be counted in determining whether the taxpayer comes within the definition. The first full calendar week of the year began on Sunday, January 5, 1941. From that date until May 16, 1941, there were 18 full weeks and six days of the nineteenth week. Consequently, unless one of the first four days of the year can be counted as one of the 20 requisite days, the taxpayer is not an "employer", and does not owe the taxes claimed.

The Government's position is that a week need not be wholly within the taxable year in order to be counted. It cannot be denied that 18 full calendar weeks were covered in the period involved. Therefore, there were at least 18 days, each in a different calendar week, on which eight or more persons were employed. In addition, there were eight or more persons employed on at least one day in the period prior to Sunday, January 5, 1941, and that period certainly was in a different week from the 18 following weeks. Similarly, in the period following midnight, Saturday, May 10, 1941, there was at least one such day not within any of those 18 weeks, and the taxpayer apparently does not object to counting that day. Every day must be in some week, and these two additional days at each end of, but not in, the 18-week period must have been in two additional weeks. The statute only requires that the days, in order to be counted, fall within the taxable year and in different calendar weeks. Certainly January 1 to January 4, were days within some calendar week. They were not in the calendar week beginning on January

5, and hence must have been in a "different calendar week." Consequently, there were 20 days, each in a different calendar week, during which the taxpayer employed eight or more persons.

If the rule for which the Government contends is not followed, the definition would unfairly discriminate against taxpayers whose situations were actually identical. For example, suppose a taxpayer had started to employ eight or more persons on Wednesday, January 8, 1941, one week later than the taxpayer involved herein. Suppose further that this taxpayer continued to employ eight or more persons through Friday, May 23, 1941, one week later than the concluding date in this case. From a practical standpoint, such a taxpayer would be identically situated with the taxpayer in this case, and should bear the same tax burden. However, the rule for which the taxpayer herein contends would exempt him from taxes while including the other as an employer.

There can be no doubt of the validity of the method of classification contained in the definition in Section 1607 (a). The Supreme Court has upheld it. *Carmichael v. Southern Coal Co.,* 301 U. S. 495; *Steward Machine Co. v. Davis,* 301 U. S. 548.

The interpretation for which the Government contends has been set forth in S. S. T. 414, 1941-1 Cum. Bull. 412. It was sustained by the United States District Court for the District of Massachusetts in *Garage Service Corp. v. Hassett,* decided January 12, 1942, not officially reported, but found in C. C. H., Unemployment Insurance Service,

par. 8974. In that case the tax period began on Friday, January 1, 1937, and ended on Tuesday, May 11, 1937. The court held that Friday or Saturday, January 1 or 2, could be counted as the first of the requisite 20 days, despite the fact that part of the calendar week in which they fell was in the previous taxable year. As in this case, there were at least two days on which eight or more persons were employed on either side of a period of 126 days, covering 18 full calendar weeks. In his opinion in that case Judge Ford made the following pertinent observations:

> I cannot agree with the plaintiff's contention that the calendar week from which a day is taken must fall within the taxable year. The statute merely requires employment on a day within the taxable year. Such a day, provided it is within the taxable year, may be taken from any calendar week, whether the calendar week is wholly within the calendar year or not, as is the case here of the week in which January 2 fell. The statute omits the words "during the taxable year" after the words "calendar week". I can think of no reason to infer that Congress meant them to be implied. If the intention was that the statute should be construed as the taxpayer argues, it is apparent that Congress could have assured comprehension of their meaning by inserting the phrase "during the taxable year" after "calendar week" instead of after "days". * * *

Conclusion.

The decision below, holding that the taxpayer was not an employer under Section 1607 (a) of the Internal Revenue Code, as amended, was erroneous, and should be reversed.

Respectfully submitted,

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April, 1942.

APPENDIX.

1941	Sun.	Mon.	Tue.	Wed.	Thr.	Fri.	Sat.
Jan.	....	....	....	1	2	3	4
	5	6	7	8	9	10	11
	12	13	14	15	16	17	18
	19	20	21	22	23	24	25
	26	27	28	29	30	31	....
Feb.	....	....	....	....	....	....	1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	....
Mar.	....	....	....	....	....	....	1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30	31	....	....	....	....	....
Apr.	....	....	1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30	....	....	....
May	....	....	....	....	1	2	3
	4	5	6	7	8	9	10
	11	12	13	14	15	16	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	31